

Laws, Conventions, and Fake Constitutions

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Gábor Attila Tóth Fr 7 Dez 2018

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In January 2011, Ronald Dworkin gave a talk about democracy to a large audience at Central European University in Budapest. A few months earlier the then-opposition party, Fidesz, had won a landslide victory in the Hungarian election. Popular support and a disproportionate electoral structure had ensured the new government two-thirds of the seats in the Parliament, a majority sufficiently large to set about changing the constitutional system.

"What is Democracy?" was the title of Dworkin's lecture. Although he was very aware of the local problems of constitutionalism, Dworkin did not choose to talk about a specific country; instead, he asked in general whether such a majoritarian decision making represented the triumph or the ruin of democracy. As one might expect, Dworkin rejected the idea that democracy just means majority rule. Rather, he argued that pure majoritarian decision making neither has intrinsic value, nor does it offer better consequences for society. His conclusion was that majority rule gives the government no legitimacy at all.

Today we may understand better the significance of that argument. The case of Hungary is not isolated but is an integral part of a global phenomenon. In contrast with earlier waves of democratization that spread across the globe, more recent tendencies have led to the disintegration of democracies. Not only Hungary and Poland (two EU Member States), but also Russia (probably the first regime of this kind), and many other countries from Azerbaijan to Venezuela epitomize this phenomenon, in which the country in question adopts – apparently in a democratic manner – a legal transformation that moves it ever further from, rather than toward, democratic principles.

But I must confess that I felt uncomfortable after the Dworkin-lecture. However convincing arguments Dworkin offered on the shortcomings of the majoritarian democracy, I found the application of those considerations in the case of Hungary and other countries in similar conditions unsatisfactory. Why? Because the whole reasoning remained within the framework what John Rawls called a well-ordered society, a highly idealized abstraction, whose political institutions are just, or at least decent. Dworkin's talk can be seen as a persuasive argument about the incompatibility of the idea of a well-ordered society with pure majoritarianism. But the regimes in Hungary and elsewhere do not aspire to approach the idea of a well-ordered society in Rawlsian terms. Even if, for the sake of argument, we assumed for a moment that pure majoritarian democracy is based on good reasons, this would not apply to the new regimes. The new deviation from the accepted standard of constitutional democracy and pure majoritarianism are poles apart.

Two rival approaches

The rise of autocratic majority has become the focus of considerable academic attention. There seems to be a consensus that while the new regimes differ in some respects, they share key characteristics. The new competitor to constitutional democracy has begun to take shape as autocratic in political form, nationalist in ideology, and capitalist in economics (though the case of Venezuela shows that it can be socialist in economics too). Moreover, the ideas and practices of emerging regimes in question are far from independent of each other, as the extensive use of phrases “nationalist international” and “autocratic international” demonstrate. Apart from the scholarly consensus on some characteristics, we may distinguish two widespread and influential approaches.

The first approach places great emphasis on historical analogies. Many researchers claim that the current erosion of constitutionalism can be better understood if the transformation is compared to the interwar period and the rise of fascism in Europe and beyond. Among its defining features we can find political polarization in constitutional matters, xenophobic nationalism as mobilizing ideology, rejection of international cooperation, restrictive immigration policies, stigmatized “enemies of the people,” and arbitrary use of emergency powers. One such scholar is the philosopher Jason Stanley, who points out the similarities between ultranationalist autocratic regimes by giving extensive examples of how they use for their purposes, among others, mythical past, fears, corruption, economic inequality. The former US Secretary of State, Madeleine Albright suggests that we should examine the careers of Hitler and Mussolini if we want to understand Chávez, Erdoğan, Orbán and Putin. In my view, the best work here is Timothy Snyder's, The Road to Unfreedom. It goes further in explaining the historical roots of today's autocracies. As an example, Vladimir Putin

follows ideas of Ivan Ilyin, a Russian philosopher who once imagined “Russian Christian fascism,” and borrowed ideas from Carl Schmitt (for example, politics is the art of identifying and neutralizing the enemy). Snyder argues that the constitutional system of the Russian Federation today resembles the Russian Empire of the late nineteenth century. Both systems reject the rule of law as the principle of government. Law today is almost the same as “произвол,” the arbitrary rule by autocratic tsars.

The objective of the second approach, in contrast, is to highlight the original quality of the transformation. Its main argument is that contemporary autocrats use the very constitutional institutions of democracy to transform it into a kind of despotism. What is happening today is a self-destruction of liberal democracy through democratic procedures and under the rule of law. In this way, the second approach underscores the significant difference between the interwar democratic decline and the current transformation. One good example of this is the book by Steven Levitsky and Daniel Ziblatt. Although they offer many lessons from modern history that reveal the “rhymes of history,” the authors argue that democracy dies in an unprecedented way: peacefully, slowly, legally. Kim Lane Scheppele’s works belong to the best constitutional accounts of the approach that seeks original features. She labels it “autocratic legalism,” when electoral mandates combined with legal change push through an illiberal agenda. In her account, the new system is illiberal, anti-constitutionalist, and autocratic, but meets the criteria of legality and democracy at least in a formal way.^[1] Scheppele has dubbed this phenomenon the “*Frankenstate*,” in which legalistic autocrats selectively choose and stitch together the worst practices from liberal democracies to create something illiberal and monstrous. We may add that this approach shows — in quasi-Hegelian terms — how accumulated quantitative changes can lead to a qualitative change.

Each approach has of course its outstanding merits. I think, however, that it would be a grave error to simply treat contemporary authoritarianism as a revival of twentieth century autocracies. Clearly, we should learn from the lessons of history. We should also understand the roots of the new authoritarianism; several cases demonstrate that contemporary populist authoritarians have not entirely abandoned the aims and methods of their ancestors. However, authoritarianism has reinvented itself in recent years. Its most salient new feature is that, under a façade of constitutionalism, it claims to abide by democratic principles. Authoritarians gain the power peacefully and legitimize themselves through regular multiparty elections and referendums. Controlling constitutional institutions remain in place, and blatant prohibitions are not experienced every day. These are the main reasons why such antidemocratic systems are more difficult to discover and assess properly.

The second approach does contribute to the understanding of legalistic techniques used by autocrats. But it has its costs. This approach emphasizes the similarities between constitutional democracies and modern autocracies in their democratic roots or legal institutions while underplaying their fundamental differences. Many questions arise here: Do the people in emerging authoritarian states exercise their democratic voting rights? Is the Russian Duma a democratically elected body? Does the Hungarian Government have democratic legitimacy, whereas international observers concluded that recent elections were not fair? Why do Jarosław Kaczyński and justice minister Zbigniew Ziobro in Poland

need constitutional justices, judges and public prosecutors who are ready to obey their authority? If the transformation is legal, why do they need followers instead of independent officials? If we maintain that constitutional procedures and institutions are just a fig leaf designed to show democratic legitimacy and cover something else, we should understand what is being covered up, and how.

Here I would like to offer two sketchy hypotheses for our symposium, with the aim of identifying the rise of an autocratic majority. The first hypothesis is about the constitutional character of contemporary authoritarianism, the second is about the relevance of constitutional conventions.

Pretence of constitutional democracy

Today there is a general agreement that democracy is the best or the most legitimate constitutional system available. Understood as the self-rule of the people, democracy does not have rivals. Remember how Hans Kelsen clarified the correlation between democracy and legitimacy: it is not inherent in the nature of democracy that it is always the best system of government; on the contrary, the question is what is the best form of government, and today the answer is democracy, but that was not the case earlier in history and will not be necessarily always the case.

Given that today democracy counts solely as a legitimate constitutional system, the most salient new feature is that authoritarianism must play at being democracy. Thus, a key attribute of today's authoritarianism is that it pretends to comply with the rule of law and democratic standards. Elsewhere I argue in detail that we can better distinguish authoritarianism from, on the one hand, its predecessors, on the other, constitutional democracies, if we understand the mechanisms that create the pretence. Pretence here means that the new system behaves *as if* it were a constitutional democracy. It claims, first, that it has obtained fair and democratic authorization from the majority of the people, and second, that it is respecting the rule of law and democracy.

I think that both claims are false. Even if we take a majoritarian conception of democracy, authoritarianism fails to fulfill its criteria. Perhaps everyone agrees that fair and free popular elections are a prerequisite for majoritarianism. Therefore, first, majority rule includes some procedural rights. It seems also widely accepted that there are no fair and free elections without impartial election bodies and independent judicial review of the procedural decision of those bodies. Therefore, second, majority rule also includes institutional guarantees. Moreover, there are no free elections without permanent and passionate public discourse and political activity. Thus, third, a set of rights, from freedom of speech and the media to freedom of personal liberty, are also necessary conditions of majoritarianism. In other words: even within the majoritarian paradigm there are constitutional mechanisms serving to govern the formation of a normatively legitimate majority rule.

Today authoritarian systems retain multiparty elections and provide scope for the activities of opposition movements. What makes them distinctive is that the election is managed so as to deny opposition candidates a fair chance. Legal norms and practices ensure the dominance of the ruling party. The governing party may enjoy undue advantage because of

partisan changes in election law, unequal suffrage, gerrymandering of electoral districts, restrictive campaign regulations, far from independent assessment of the election, and biased media coverage. In short, democracy is where the authorities arrange elections; authoritarianism is where the authorities arrange the elections and the results.

Institutions of constitutional judiciary are not abolished, as autocrats in the old times would have done, but neutralised. Arbitrary decisions of the constitutional justices, appointed according to the will of the authoritarian leader, contribute to the reinforcement of the system. Authoritarian constitutions formally declare fundamental rights for their citizens, but these are rarely legally enforceable. A common tactic is to construct a constitutional catalogue of fundamental rights, ostensibly based upon the international standards arising from the UN's Universal Declaration of Human Rights and regional human rights treaties. Yet the constitution in reality contains a number of sections in direct contradiction to international human rights law, typically, recognising certain fundamental rights, but only to the extent that these rights serve the interests of the ruling political group. For example, freedom of speech and the press can be denied or restricted in the name of the nation, the dominant ethnic group or religion, or protection of the head of state or other high officials. Thus, I think we cannot insist that the new autocratic rise is as a matter of form legal and democratic. Authoritarianism pretends to play by democratic rules.

A matter of convention

In constitutional law, tradition may mean, among others, acceptance of constitutional conventions. By constitutional conventions I understand longstanding usages, which are not codified by legislative bodies, and not enforced by the courts; instead, they are created by a cooperative practice of key constitutional players and accepted as binding. Constitutional institutions obey conventions, and the courts may refer to them as a basis for a constitutional principle.

There is a famous model of constitutionalism in which conventions play a crucial role. In the United Kingdom, the uncodified constitution consists of statutory rules (acts of the Parliament), court decisions (common law) and unwritten, unenforceable, but binding constitutional conventions. Both political virtue and the force of public opinion, but not the courts, require that constitutional institutions obey conventions. By way of an example, a government minister who has lost the confidence of the House of Commons is obliged to resign. Similarly, discretionary powers of the government make it possible to take actions without the necessity to apply to Parliament for new statutory authority. Important conventions regulate the relationship between the Monarch and the Parliament: the convention requires the Crown to assent parliamentary legislation.

The United States constitutionalism also needs unwritten constitutional conventions. For example, conventions regulate that the President govern with the endorsement of the Congress. Not the text of the Constitution but conventions require a cooperation between the Senate and the President in electing judges. The constitutional text does not prohibit that constitutional institutions use their competences to the hilt. A president could govern unilaterally by issuing executive orders, proclamations, memorandums. S/he could bypass the judiciary by refusing to enforce court judgments or using extensively prerogative of the

presidential pardon. Senate could block the president from appointing justices or members of the executive. Unwritten conventions may thus prevent constitutional institutions and decision makers from bringing deadlock and crisis.

One may say that conventions are in a grey zone of constitutionalism. Or one may insist that in many countries, the notion of constitutional conventions is virtually unknown. The Venice Commission can hardly review a change in conventions. The procedure covered by Article VII of the Treaty of the EU focuses on codified rules rather than conventions.

In my view, constitutional conventions do matter. Unwritten conventions may prevent constitutional institutions and decision makers from bringing deadlock and crisis. Their continued existence show that political players respect not only the letter of the constitution, but also its spirit; and they accept that their political opponents have an equal right to exist, compete for power, and govern.

Longstanding constitutional conventions can be broken. This is what happened in the US even before the Trump presidency. Legislative minority blocked legislation by prolonging endlessly the debate (filibuster). The Senate blocked president Obama from appointing a new justice to the Supreme Court. In general, politics became polarized. The established forms of toleration and institutional self-restraint were challenged. Constitutional checks have been used excessively. As a consequence, beyond multiple social factors, polarization and deadlock contributed to the emergence of an authoritarian presidential administration.

My hypothesis is that both in Hungary and Poland constitutional conventions were established during and after the democratic regime changes. Distributing key positions in parliament, selecting Constitutional Court justices, respecting constitutional case law as a guide to constitutional democracy and many other constitutional matters were to a greater or lesser extent regulated by conventions.

Susan Rose-Ackerman's contribution to this symposium discusses the relevance of oversight bodies. Remember the innovative and efficient ombudsman-system, established after the democratic regime change in Hungary. The commissioner for data protection and freedom of information served as an example for many countries in the region and beyond. In keeping with the spirit of ombudsmanship, the commissioner's main findings, recommendations, interventions were respected, and mostly regarded as binding, without coercive legal powers. Conventions of ombudsmanship played a crucial part in the working of the constitutional system. By contrast, the post of the commissioner for data protection and freedom of information was abolished by the 2011 Fundamental Law, and the official website was shut down. In comparison, from Ewa Łętowska to Adam Bodnar, the Polish Commissioner for Citizens' Rights created a rich collection of constitutional conventions – not surprisingly, this tradition is under serious attack today.

I close by repeating my hypotheses about contemporary authoritarianism. First, what we are experiencing is not a legal and democratic suicide of constitutional democracy. Authoritarianism only pretends to obey the rule of law and democracy. Second, we may witness the rise of authoritarianism before rule of law violations can be detected: when

constitutional conventions are seriously eroding. Conventions can be improved gradually and consensually and can be broken radically and unilaterally. The former may prove constitutional resilience, the latter may be a sign of authoritarian surge.

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